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Supreme Court, U.S.
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No. _____

United States Supreme Court

Jimmy D. Giles,

Petitioner,

v.

University of Mississippi,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does the University of Mississippi ban on flagstaffs impinge on expressive conduct protected by the First Amendment?

II. Was the Fifth Circuit correct in affirming the District Court's evidentiary ruling striking Rychlak's law-review article, voluminous newspaper articles and the affidavit of K.H. "Bo" King?

III. Is the University of Mississippi ban on flagstaffs a *pretext* for banning display of the Confederate flag?

IV. Does the University of Mississippi ban on flagstaffs pass muster under *United States v. O'Brien*, 391 U.S. 367, 377 (1968)?

PARTIES

The Board of Trustees of State Institutions of Higher Learning was a party in the lower courts but is no longer involved. The complaint in the District Court and the brief in the Fifth Circuit were styled *Jimmy D. Giles v. The University of Mississippi, by and through its chancellor, Robert C. Khayat; Board of Trustees of State Institutions of Higher Learning, by and through its president, Ricki R. Garrett.* The only remaining parties appear in the caption. Petitioner will be referred to by his name, "Giles"; Respondent will be referred to as "the University."

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The decisions of the Fifth Circuit Court of Appeals and the United States District Court for the Northern District of Mississippi, Western Division are not officially reported and are reproduced in the Appendix beginning at page App. 1 and 3, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The decision of the Fifth Circuit Court of Appeals was filed on May 21, 2001. The jurisdiction of the United States District Court for the Northern District of Mississippi, Western Division was based on 28 U.S.C. sections 1331, 1343 and 2201 and 42 U.S.C. section 1983 and 28 U.S.C. section 1391(b).

CONSTITUTIONAL PROVISION

The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

THE UNIVERSITY'S "STICK BAN" (Oct. 22, 1997)

Consistent with the existing policy of banning umbrellas for *safety reasons* effective November 1, 1997, spectators will not be permitted to bring sticks or other pointed objects to University of Mississippi athletic events. (emphasis added)

STATEMENT OF THE CASE

On September 11, 1999, Giles attended a University football game held at Vaught-Hemingway stadium in Oxford, Mississippi. During the course of the game, he was

observed waving a small Confederate flag mounted on a flagstaff by University police and other security officials. The officials approached him and advised him that his actions violated the University's "stick ban" which prohibits spectators from bringing pointed objects, including flagstaffs, into University athletic events. Giles was given the choice of surrendering the staff of the flag or leaving. He left the stadium.

Giles filed a complaint against the University in the District Court claiming waving a Confederate flag on a flagstaff was expressive conduct protected by the First Amendment. The District Court dismissed the complaint and ruled the flagstaff ban did not violate the First Amendment. Giles appealed to the Fifth Circuit. The Fifth Circuit affirmed the District Court's opinion.

REASONS FOR GRANTING PETITION

I. The University's flagstaff ban impinges on expressive conduct protected by the First Amendment.[1]

The sole purpose of a flag is to communicate ideas and a flagstaff is essential in the effective display of a flag. As Justice Stevens wrote in *United States v. Eichman,* 496 U.S. 310 (1990) "The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively."

The flagstaff ban ended a fifty-year tradition of waving Confederate flags at University football games. A tradition rooted in political controversy. A symbol imbued with expression. The Confederate flag is not just any flag.

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[1] *Freedman v. Maryland,* 380 U.S. 51 (1965) (government must bear burden of proving speech is unprotected by the Constitution). *Speiser v. Randall,* 357 U.S. 513 (1958) (a basic First Amendment principle is that government action may violate First Amendment even if the government honestly believes the speech is unprotected).

Southern armies have fought under it. Southern legislatures have flown it over their capitols to express the idea of Southern heritage or defiance of *Brown v. Board of Education*, 347 U.S. 483 (1954). The Ku Klux Klan has adopted it to express the idea of racism. The National Association for the Advancement of Colored People has declared war on it as a racist symbol and painful reminder of slavery. The academic community of which the University is a part has deemed it politically incorrect, viewing it as an impediment to diversity and expressing the idea of intolerance and hate. Eastern European countries waved it to celebrate their newfound freedom from the Soviet Union. The Confederate flag or rebel flag is not content neutral nor is any regulation that bans its effective display. Like the nazi flag, the rebel flag is both hated and revered and is one of the most recognized political symbols in the country if not the world.

The Confederate flag is a potent political symbol, "pregnant with expressive content". See *Texas v. Johnson*, 491 U.S. 397 (1989). Display of a flag communicates ideas. It associates the holder or the place from which it is flown or waved with the politics or the beliefs associated with that flag. In *West Virginia v. Barnette*, 319 U.S. 624 (1943) this Court wrote:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followers to a flag or banner, a color or design.

This Court in *Texas v. Johnson*, 491 U.S. 397 (1989) upheld the public desecration of the United States flag which this Court considered a form of protest against policies of the government "situated at the core of our First Amendment

values" and thus protected by the First Amendment. Delivering the opinion of the Court, Justice Brennan wrote:

> Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence v. Washington*, 418 U.S. 405, 409-411 (1974); refusing to salute the flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) at 632; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 368-369 (1931), we have held, all may find shelter under the First Amendment. See also *Smith v. Goguen*, 415 U.S. 566, 588 (1974) (White, J., Concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). *That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising.* The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." (emphasis added)

Situated on the route from the battlefield at Shiloh to Corinth, Mississippi, the University, widely referred to as *Ole Miss*, is inextricably involved in Civil War history. Every student and instructor left for service in the Confederate Armies, campus buildings were used for hospital purposes by both sides at times during the course of the war and the campus is the burial site for a number of Confederate dead. Racial integration enforced by the federal government aroused resentment in many students at the height of the Civil Rights Movement and display of the Confederate flag became "omnipresent" particularly in the stadium during football games (App. 12, ¶ 2).

Prior to the flagstaff ban, waving the Confederate flag in Vaught-Hemingway Stadium was traditional. The

custom was not only permitted by the University for decades but encouraged by it in that cheerleaders under the control of University officials threw bundles of Confederate flags on flagstaffs into the stands to be used by spectators (App. 12, ¶ 2). The flagstaff ban discriminates against spectators desiring to express views by waving flags in that "official school representatives such as bands, cheerleaders, mascots or food vendors" are exempted.[2] Freedom of speech is relegated to a position lower than the vending of corn dogs, a food item sold on a stick, but exempt from the ban on all other sticks.

Giles waved a Confederate flag on a flagstaff in Vaught-Hemingway Stadium openly defying the University's flagstaff ban in the wake of condemnation of the Confederate flag by the University's chancellor, athletic director, football coach, faculty and student senate at a time in the South when the National Association for the Advancement of Colored People had declared war on the Confederate flag (App. 11-19; 25-38). Giles defied the flagstaff ban at a time in Mississippi when political efforts were underway to change Mississippi's historic 1894 state flag to remove the Confederate flag from the canton. The context in which Giles waved a Confederate flag on a flagstaff included condemnation by political correctness of all things Confederate, whether the Confederate flag flying atop the capitol in Columbia, South Carolina or Montgomery, Alabama, or the Confederate flag in Georgia and Mississippi's state flag. Giles' waving of the Confederate flag occurred in a context in which critics of the Confederate flag send public school children home for wearing

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[2] "The [University] Sports Information Department['s] . . . definition of . . . a stick. . . . 'A long, slender, and usually tapering piece of wood, metal, composite or other hard materials shaped for a specific purpose, as a wand, staff, club, baton, cane, rod, etc. This does not include items used by official school representatives such as bands, cheerleaders, mascots or food vendors.'" Rachel Malone, *Security officers to enforce stick ban*, THE DAILY MISSISSIPPIAN, Nov. 6, 1997, at 1.

Confederate flag T-shirts, a context in which critics of the Confederate flag would abolish the symbol from the face of the earth and silence those who even wish to sing the song *Dixie* including the Chief Justice of this Court (App. 11-19; 25-38).

The University's flagstaff ban operates as a "speech code" to restrict and inhibit free and open discussion which the federal courts have struck down because they encompass and "chill" constitutionally protected expression. See *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E. D. Mich. 1993) aff'd, 55 F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, inter alia, " 'discriminatory comments' "directed at an individual that " 'intentionally . . . demean' " the " 'sex ... of the individual' " and " '[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'"); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F. 2d 386 (CA4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones). Compare these actions of the universities with chancellor Khayat's stated objective of creating an "open, inclusive, nurturing community" (App. 31-32).

An on-campus dissenter, University law professor Ronald J. Rychlak wrote: "The movement to control speech on campus is born out of legitimate concern for the well-being of students, but it has a sinister side . . . the chilling effect on those who are concerned about the potential punishment . . . will surely stifle the free and robust exchange of ideas that is so critical to the campus climate . . . I still would prefer that the flag not be waved . . . [t]he flag might even provoke occasional acts of violence . . . [s]till, this is preferable to restricting free expression" (App. 17, ¶ 3).

For the lower courts to rule that Giles was not engaged in expressive conduct protected by the First Amendment belies the facts in this case and the history of our country and is flagrant judicial error.

II. Rychlak's law-review article, voluminous newspaper articles and the affidavit of K.H. "Bo" King illustrating the flagstaff ban to be a transparent pretext for banning display of the Confederate flag are significantly probative, pertinent evidence and should not have been struck (App. 11-17; 39-41; 18-19).

This case is all about the University's motivation for banning stick flags and Giles' contention that the flagstaff ban was adopted as a pretext for banning display of the Confederate flag. Giles' evidence, a law-review article, voluminous newspaper articles and the affidavit of K.H. "Bo" King establishing the existence of such a speech suppressive motivation for the ban on the part of the University was struck by the District Court (App. 11-17; 39-41; 18-19). The law-review article was an inside account by a University law professor of how detrimental Confederate stick flags were to the University's image and how law school faculty schemed to ban the flags display. The law-review article, newspaper articles and affidavit were used in opposition to the University's motion for summary judgment to establish the existence of material facts. The affidavit of K.H. "Bo" King should be given all the weight that the one affidavit offered by the University alleging that an unnamed, unidentified person in 1990 had complained of being injured by a stick flag was given. See *Church of Scientology Flag Service Org.. Inc. v. City of Clearwater*, 2 F.3d 1514, 1528-29 (11th Cir. 1993) ("such materials were appropriately submitted by the non-moving party in opposition to the motion for summary judgment").

This evidence was not subject to reasonable dispute in that it was generally known within the territorial jurisdiction of the trial court and it was capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned. The trial judge, himself an Ole Miss alumni and former cheerleader knew all of the struck material to be true and the flagstaff ban to be a pretext stating:

> In particular, the Court is interested in the presentation of argument and evidence concerning the purpose of the stick ban, whether its adoption was a *pretext* for banning the display of the Confederate flag, and whether the possible existence of an improper motive or purpose of suppressing such expression is an appropriate inquiry in determining the validity of the prohibition in question (App. 21).

Giles supplied the district court with that evidence, in particular King's *affidavit*. Yet the district court's order granting the University's motion for summary judgment stated, "The nonmoving party's response, by *affidavit* or otherwise, must set forth specific facts showing that there is a genuine issue for trial (App. 6, ¶ 2)." The District Court also denied Giles' request that the court take judicial notice of the Confederate flag controversy in spite of Rule Number 201(d) of the Federal Rules of Evidence, providing for mandatory judicial notice upon request.[3]

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[3] The campaign against the Confederate flag was the subject of another lawsuit, *Giles v. State of Mississippi et al.*, No. 3:01CV118BN (2001), where the court took judicial notice of the ongoing Confederate flag controversy (App. 23-24).

III. The University's flagstaff ban is a transparent *pretext* for banning display of the Confederate flag.

The University's claimed purpose in adopting the flagstaff ban—it's asserted interest in promoting spectator safety—is not genuine, but is a *pretext* for banning display of the Confederate flag. Prior to implementing the ban the University waged an unsuccessful campaign to encourage fans not to wave Confederate stick flags at football games (App. 11-19; 25-38). There was no stick flag threat to spectators. Fifty years of enthusiastic flag waving experience have proven stick flags harmless. There have been no substantiated injuries from stick flags. There have been no lawsuits against the University claiming liability because of stick flags. The University's motivation was to limit speech and expression and to rid the football stadium of a sea of Confederate flags.

In July 1995, Robert C. Khayat became chancellor of the University. He had written an article in which he stated the objectives of "assuring that we are an open, inclusive, nurturing community" and making a degree from the University universally respected (App. 31-32). Of course neither of these objectives was possible without changing the *Confederate* atmosphere on campus since politically correct leaders in the academic world regarded this as backward and provincial if not treasonable. At the same time head football coach Tommy Tuberville found himself at a disadvantage with respect to his rival schools in the Southeastern Conference in recruiting promising athletic prospects, most of whom happened to be black and the blossoming of Confederate flags being waved in the stands in support of a team named the Rebels adversely affected the athletic department's revenue from televising football games in the North and East (App. 33-35). University officials had long considered possible solutions. University Law Professor Ronald J. Rychlak had written: "[O]ur task was to find a way to keep people from waving the Confederate flag

without offending the First Amendment of the Constitution" (App. 14-15, ¶ 3). The chancellor arranged for a nationwide survey of the University's image, which was of no help because it revealed that the University was seen mostly as a party school not as a Confederate outpost. At a widely heralded news conference to discuss the survey findings, the chancellor with tears in his eyes and his voice choked with emotion spoke of the "hate mail" his efforts had engendered from die-hard supporters of tradition (App. 32). He spoke of achieving improvement in substance but it was clear the problem was the symbols, visible to viewers of football games on national TV and irritating to African-American students and other critics. He suggested the name of Confederate Avenue on campus should be changed. He conceded he could not constitutionally ban the Confederate flag, the main sticking point, and presented his role with respect to the symbols as placing them on the table to be dealt with by students, alumni and their organizations. He said he was confident the symbols would "evolve over time" to present a true image of the University as it exists, not as it has been in the past (App. 26, ¶ 3). Meanwhile, Coach Tuberville continued to rail against the Confederate flag in the stands.[4] Jesse Jackson joined the opposition to the *Confederate* atmosphere. The black students and various student activists became involved, debates occurred and the controversy was widely publicized in the local and national press.

> When people are in large groups, waving Rebel flags, cheering Dixie, other things tend to happen. They say things that are offensive to black folks, said state Sen. Johnnie Walls, D-Greenville, who attended the Ole Miss law school and is head of the state National Association for the Advancement of Colored People.

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[4] Robert Falkoff, *Ole Miss coach asks fans to drop rebel flag, Confederate flag hurts school's image, athletic program, Tuberville says*, CLARION-LEDGER, Sept. 26, 1997, at A1.

> The symbol that evokes the most bad feeling is the flag. You see it in any footage of Klan marches. The Col. Reb and Dixie are not in that same category or nearly as offensive, though Dixie is close (App. 30-31).

The Associated Student Body Senate passed a resolution October 15, 1997, discouraging the waving of the Confederate flag by recommending that the athletic department ban sticks from Vaught-Hemingway Stadium:

> * * *
>
> WHEREAS, Our campus is becoming more and more divided, and this is detrimental to our institution as a whole and;
>
> * * *
>
> WHEREAS, The Confederate flag has become a symbol of divisiveness on both local and national levels and;
>
> WHEREAS, Ole Miss has become unfairly associated with this divisive and hateful image in the eyes of the nation, as is evident in the national media and;
>
> WHEREAS, We are losing potential students, resources, and faculty due to this constant negative exposure and;
>
> * * *
>
> THEREFORE, this University of Mississippi campus senate discourages the waving of the Confederate flag *by recommending that the athletic department ban sticks from Vaught-Hemingway Stadium* effective immediately and furthermore challenges other campus organizations to take such a stand[5] (emphasis added).

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[5] University of Mississippi Associated Student Body Senate, *ASB Resolution 97-17*, THE DAILY MISSISSIPPIAN, Oct. 16, 1997, at A1.

Reiterating its position the Student Body Senate passed another resolution October 21, 1997, condemning waving of the Confederate flag by name at football games. The chancellor praised these actions, and at this point University officials gave up on jawboning and resorted to unlawful force. On October 22, 1997, University athletic director Pete Boone proposed a flagstaff ban to the 12-member Faculty Council, which consists of the University's vice chancellors and it was approved the same day. Despite the purported fear of injuries, the ban was not enforced at the first game after it went into effect, and flags appeared in the stadium. Boone explained the timing of the enforcement of the flagstaff ban:

> It goes into effect at this Thursday's Ole Miss-Arkansas football game, that will be viewed nationwide on ESPN and is the only football game on TV that night.
>
> 'The nation's spotlight will be on us,' Boone said. 'To me, the Thursday night slot is one of the most beneficial because it's the only game in town, so to speak.'[6]

First Amendment analysis concerning government regulation of conduct containing both speech and nonspeech elements requires the government to establish a requisite governmental interest, the lack of a relation to the suppression of speech, and a merely incidental burden on expressive conduct. The University's belated concern for spectator safety after fifty years of enthusiastic flag waving is a transparent *pretext*.

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[6] *'Nothing on a stick' policy will be enforced, Fans who try to bring in sticks will be treated in professional manner,* THE OLE MISS SPIRIT, Nov. 8, 1997, at 2.

Government suppression of protected speech justified only by a *pretext* is unconstitutional. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding that zoning laws restricting the location of movie theaters do not violate the First Amendment unless they are a *pretext* for preventing free speech).

The alleged safety concern is said by the University to derive from a single injury which occurred in 1990, but strangely the University waited seven (7) years, until October 22, 1997 to issue the flagstaff ban. While pretending concern for safety of spectators, the University disregards the inherent danger in the game of football itself. One member of the University team, Chucky Mullins, was permanently disabled and later "died on May 6, 1991, from a blood clot in his lungs" of injuries received on the field.[7] There has been a prolonged, rancorous controversy over the "omnipresent" Confederate flag at the University (App. 12, ¶ 2). The Confederate flag controversy at the University is a matter of public knowledge having received widespread local and national media coverage and no one is fooled as to the real purpose of the flagstaff ban (App. 11-19; 23-38). The flagstaff ban is unconstitutional because it was promulgated with an eye toward the suppression of free expression. See *Church of Scientology Flag Service Org. Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993).

IV. The University's flagstaff ban does not pass muster under *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The judgment of the Fifth Circuit relied on *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Fifth Circuit adopts the position that the University's interest in "promoting spectator safety" is superior in a constitutional

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[7] Josh Van, *Chucky Mullins injured against Vanderbilt in 1989 homecoming*, THE DAILY MISSISSIPPIAN, Sept. 17, 1999, at A1.

sense to petitioners right to freedom of speech (App. 9, ¶ 1). But such a conclusion is not justified by the facts, circumstances and context since the flagstaff ban is a transparent *pretext* for banning display of the Confederate flag and not a measure adopted to promote spectator safety. This is obvious because of the anti-Confederate stick flag campaign by the University and because the single alleged injury cited to justify the ban occurred in 1990, seven years before the ban was enacted.

The *O'Brien* Court stated: "[A] government regulation is sufficiently justified . . . if the governmental interest is unrelated to the suppression of free expression . . . ." Here, the University's interest was completely related to the suppression of free expression, banning display of Confederate flags and completely unrelated to a genuine concern over spectator safety.

The right of freedom of speech is not just any right. Celebrated in the classic works of John Milton, John Locke and John Stuart Mill, it was said by James Madison, author of the First Amendment, to be the only effectual guardian of all our other rights.[8] Justice Stevens wrote in *R. A. V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992) that when the government regulates political speech, "First Amendment protection is at its zenith" quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

The Fifth Circuit apparently derived from *United States v. O'Brien*, 391 U.S. 367, 377 (1968) that motivation of the government action in restricting speech is irrelevant. To the contrary the *O'Brien* Court weighed the importance of the government interest involved against the right of *O'Brien* and others to protest the Vietnam War and the draft. The decision noted "the stakes are sufficiently high for us to eschew guesswork". Here the stakes are not high and one need not guess as to the motivation of the University. Clearly the illicit motive of the University, a pretense of

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[8] *Report on the Virginia Resolution*

promoting spectator safety, does not pass muster under *O'Brien* where there was a genuine government interest, national defense in wartime.

The real motivation for the flagstaff ban, although ignored by the District Court and the Fifth Circuit, is the key element in this case. Some motives for government actions are constitutional and some are not. In *Hunt v. Cromartie*, No. 99-1864 (2001) it was held that concern by the legislature for the interest of black citizens was acceptable as motivation for a certain redistricting act, as long as it was not the controlling motivation, but had it been controlling the resulting district would have been unconstitutional. Here, the controlling motivation of the University was to censor display of a disfavored symbol, in an action that came seven years too late to address the pretended reason, In *Capitol Square Review v. Pinette*, No. 94-780, (1995) the Court said of another potent symbol that it was "private religious speech that is as fully protected under the Free Speech Clause as secular private expression" and government may regulate there "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest" *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45. Pp. 4-6." Here the University restriction was not necessary, and was overly broad and did not serve a compelling state interest, only an unlawful determination to prevent Giles and others from waving Confederate flags in the University's football stadium to express political views associated with it to tens of thousands of people. Such expression is a part of that debate on public issues that Justice Brennan wrote in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) should be "uninhibited, robust, and wide-open".

The University has not sufficiently shown or complained that stick flags have resulted in substantial danger of serious injury. To the contrary, prior to imposing the flagstaff ban the University uttered not one word concerning the physical hazards of stick flags but rather

focused all of their indignation on the moral harm of waving Confederate stick flags. The University's remedy, based on illicit motives and for a nonexistent problem, spectator injury from stick flags, formulated by their law school faculty is too intrusive, gratuitously trampling on protected speech rights (App. 14-16). *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (The closure statute was found to be motivated by use of the store by persons soliciting prostitution, but the statute cited only sale of adult books. Held: The closure statute fails that part of the *O'Brien* test that requires that the restriction be no broader than necessary to achieve its purpose). The University found itself awash in a sea of Confederate flags not lawsuits from those injured by stick flags. Afterall, anyone who negligently pokes another in the eye with a flagstaff is of course liable for civil damages, just as a motorist who runs over a pedestrian on the way to the football game would be. Here there has not been one substantiated stick injury nor one lawsuit claiming the University liable for a stick injury.

This Court never intended for *United States v. O'Brien*, 391 U.S. 367, 377 (1968) to authorize a pretext to suppress protected speech rights.

CONCLUSION

Motivation matters when the government regulates protected speech. The University's motivation in adopting the flagstaff ban was to ban the display of Confederate flags, to suppress free expression, not to promote spectator safety. The University's safety concern is unsupported by any credible showing of serious injury sustained by spectators over the past fifty years of enthusiastic waving of Confederate stick flags while one football player has died from injuries sustained on the field. At the same time the University's campaign against Confederate stick flag waving spectators is manifest. While the University's *pretext* is slick and clever, formulated by their own law school faculty to

appeal to courts as reasonable, it nonetheless is unconstitutional because its intent and consequence is to suppress free speech. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and *spirit* of the constitution, are constitutional" (emphasis added). Plainly, halting so much core political speech by Confederate stick flag waving spectators is not legitimate and not within the scope of the constitution.

Rights and freedom necessarily entail risks but our Constitution says we must take these risks. *Terminiello v. Chicago*, 337 U.S. 1 (1949). Sticks are far less dangerous than guns, tobacco, alcohol, automobiles or talking on cell phones while driving automobiles or even the game of football itself.

The University's flagstaff ban was adopted in a context in which there was a raging controversy over the Confederate flag, at a time when the University's chancellor, athletic director, football coach and student senate were unsuccessfully imploring fans not to bring Confederate stick flags to football games. After all their propaganda failed they turned to censorship and ultimately resorted to a *pretext*, "spectator safety" for ridding the stadium of Confederate flags. The Confederate flag has been waved on millions of sticks for over fifty years and the University said nothing about spectator safety until the flag became politically incorrect.

The lower court's opinions are not a demonstration of legitimate First Amendment jurisprudence but are, rather, examples of the triumph of the political correctness agenda of the University over well-established free speech rights of students and others waving Confederate stick flags, flags pregnant with political sentiments which prevail in the local area from which the student body is drawn.

It's impossible not to conclude that the lower courts themselves have become infected with political correctness,

unable to find expressive conduct protected by the First Amendment in waving a Confederate flag and unwilling to go against the University's transparent pretext. This Court never intended for a pretext to pass muster under *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The First Amendment is under attack nationwide by leaders in the academic community including public and private universities, the public schools, the teachers' unions, the liberal media and various self-appointed arbiters of public opinion who maintain in effect that political correctness has superseded the First Amendment. A university has traditionally been the quintessential forum for free and open discussion and where hateful, ignorant or offensive speech is concerned, more speech, not less, is the proper remedy. Particularly true of a university, where the mission is to enlighten, all views should be heard, explored, supported or refuted. The flagstaff ban imposes a strong and palpable chill on constitutionally protected expression.

The University flagstaff ban is political correctness run amok and is a dangerous departure from the fundamental principles of freedom declared in the First Amendment. This Court wrote in *Speiser v. Randall*, 357 U.S. 513 (1958):

> We should never forget that the freedoms secured by that Amendment -- Speech, Press, Religion, Petition and Assembly -- are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities. See *American Communications Assn. v. Douds*, 339 U.S. 382, 445 (dissenting opinion); *Dennis v. United States*, 341 U.S. 494, 580 (dissenting opinion).

The idea that waving a Confederate flag is core political speech is buttressed by the fact that federal troops

have been engaged twice at the University, in the 1860s and the 1960s in preventing implementation of some of the ideas connected with it. If the Confederate flag issue was in fact such a "de minimis" issue there would have been no raging controversy over the flag's display (App. 8, ¶ 3; 11-19; 23-38).

As James Madison, author of the First Amendment would say, any government that bans waving a rebel flag of dissent is not legitimate and will not survive in the long-term.

Giles prays that certiorari will be granted in this case to vindicate his right of freedom of speech.

Respectively submitted,

Jimmy D. Giles, *pro se*
2000 Nathan Bedford Forrest Complex
Jackson, Mississippi 39208
(601) 933-2000 (telephone)
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00- 60659
Summary Calendar
(Filed May 21, 2001)

JIMMY D. GILES,

Plaintiff-Appellant,

versus

THE UNIVERSITY OF MISSISSIPPI, ROBERT KHAYAT, BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, RICKI R. GARRETT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:99-CV-125-P-A

Before DAVIS, JONES, and DeMOSS, circuit Judges.
PER CURIAM: *

Jimmy D. Giles appeals the district court's summary-judgment dismissal of his civil rights lawsuit, which challenged the constitutionality of a ban on flagstaffs at sporting events imposed by the University of Mississippi.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited, circumstances set forth in 5TH CIR. R. 47.5.4.

Giles argues that the district court erred in striking a law-review essay and several news accounts he submitted. Giles has shown no manifest error in the district court's evidentiary ruling. See *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993).

Giles argues that the district court erred in granting summary judgment to the defendants. Having reviewed the record, we cannot agree. See *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991). We conclude that the ban on flagstaffs did not impinge on expressive conduct protected by the First Amendment. See *Jones v. Collins*, 132 F.3d 1048, 1054-55 (5th Cir. 1998). Even if it did, the ban would pass muster under *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Giles attempts to raise arguments, concerning a due process claim and the district court's dismissal of the Board of Trustees of State Institutions for Higher Learning, for the first time in his reply brief. By not making these arguments in his initial brief, he waived them. See *United States v. Bullock*, 71 F.3d 171, 178-79 (5th Cir. 1995). Further, Giles has waived any appeal against the Board of Trustees and Ms. Garrett by failing to brief their involvement in the facts underlying this case.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JIMMY D. GILES PLAINTIFF

VERSUS CIVIL ACTION NO. 3:99CV125-P-A

THE UNIVERSITY OF MISSISSIPPI, by
and through its Chancellor, ROBERT C. KHAYAT;
BOARD OF TRUSTEES OF STATE INSTITUTIONS
OF HIGHER LEARNING, by and through its President,
RICKI R. GARRETT DEFENDANTS

MEMORANDUM OPINION
(Filed Aug. 29, 2000)

This cause is before the Court on the defendant University of Mississippi's Motion to Dismiss for Failure to State a Claim, Or In the Alternative, for Summary Judgment [17-1] and on the defendants Ricki Garrett's and The Board of Trustees of State Institutions of Higher Learning's Motion to Dismiss, Or In the Alternative, for Summary Judgment [23-1]. The Court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTUAL BACKGROUND

On September 11, 1999, Jimmy Giles attended a University of Mississippi football game held at Vaught-Hemingway stadium in Oxford, Mississippi. During the course of the game, he was observed waving a small Confederate flag mounted on a flagstaff by university police and other security officials. The officials approached him and advised him that his actions violated the University's

"stick ban" which prohibits spectators from bringing pointed objects-including flagstaffs-into University athletic events. Giles was advised that he could keep the flag so long as he was relinquished the staff. He left the stadium instead.

Giles subsequently wrote a letter to the individual members of the Board of Trustees of the State Institutions of Higher Learning [hereafter "IHL Board"]. He complained of the, September 11, 1999 incident and called on the board members to bring about a rescission of the stick ban. When Giles failed to obtain any satisfaction, he filed the instant suit against the University of Mississippi and the IHL Board, in which he alleges that the "stick ban" violated his First and Fourteenth Amendment rights. The defendants filed responsive pleadings in which they denied liability and they now seek dismissal of plaintiff's claims by way of dispositive motions. The motions have been fully briefed and the Court is ready to rule.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure, Rule 56(c), authorizes summary judgment[1] where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317,322,91 L.Ed.2d 265, 106 S. Ct. 2548 (1986). The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. *John v. State of La. (Bd. Of T. for State C. & U.*, 757 F.2d 698, 712 (5th Cir. 1985).

A judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of

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[1] Although the motions are denominated only alternative motions for summary judgment, the Court regards them as brought under Rule 56 because it relies on matter extraneous to the pleadings in its ruling.

the matter, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986).

Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Professional Managers. Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986). "The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." *Id.* "With regard to 'materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. *Phillips Oil Company. v. OKC Corporation*, 812 F.2d 265, 272 95th Cir. 1987). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, . . . all other contested issues of fact are rendered immaterial. See *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552. *Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir. 1992).

In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in a light most favorable to the non-moving party. *McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984).

The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117 (5th Cir. 1982). The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *Topalian*, 954 F .2d at 1131.

"Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment]." *John*, 757 F.2d at 708. "Summary judgment cannot be supported solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment, "even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. *Id* at 709.

However, once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d Ill, 114 (5th Cir. 1978). In other words, "the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact." *In Re Municipal Bond Reporting Antitrust Lit.*, 672 F.2d 436, 440 (5th Cir. 1982). To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed. R. Civ. P. See also *Union Planters Nat. Leasing v. Woods*, 687 F.2d at 119.

While generally "[t]he burden to discover a genuine issue of fact is not on [the] court, (*Topalian*, 954 F .2d at 1137), "Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention-the court must consider both before granting a summary judgment." *John*, 757 F.2d at 712, quoting *Keiser v. Coliseum Properties. Inc.*, 614 F.2d 406, 410 (5th Cir. 1980).

LEGAL ANALYSIS

1. IHL Board's Motion for Summary Judgment

The IHL Board seeks summary dismissal of plaintiff's claims against it based on its lack of involvement in the promulgation or enforcement of the subject stick ban. The Board submits that the stick ban was adopted pursuant to authority lawfully delegated to the University by and through its elected chancellor, Robert C. Khayat. The Board avers that the adoption of the stick ban is simple exercise of the University's proper authority to engage in game management activities. The Board further asserts that the University's action in adopting and enforcing the stick ban is merely one of the innumerable daily decisions made by the University without the approval, consent or ratification of the IHL Board. The Board also avers that it is neither rational nor possible for the IHL Board to scrutinize and/or second guess each of the daily decisions necessary to the effective management of some eight State supported universities.

Giles responds with numerous arguments, seeking to highlight the incongruity of University of Mississippi's stick ban when compared with the alleged lack of such a ban at any of the eight other state institutions subject to governance by the IHL Board. He further argues that the Board's failure to act upon his letter renders the Board "complicitous" with the University's allegedly improper proscription of pointed objects at University athletic events.[2] The plaintiff is incorrect; the arguments raised by plaintiff have been considered by another judge in this district in a case involving very similar facts and the same controlling principles of law. The principles of stare decisis, as well as the sound reasoning of that judge's opinion, dictate that this Court reach the same result. See *Barrett v. Khayat*, Civil Action No. 3:97-CV-211-B-A (N.D. Miss. Jan. 8, 1999).

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[2] Plaintiff has failed to bring forth even a scintilla of admissible evidence to support this latter argument.

2. The University's Motion for Summary Judgment

The University of Mississippi also seeks summary judgment. It argues that the subject stick ban does not even implicate the First Amendment, and that, even if First Amendment' analysis is applicable to the University's ban, it survives scrutiny under the less demanding standards of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, which sets forth the appropriate analytical standard for First Amendment cases involving hybrid "expressive conduct,"

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id. at 377.

Certainly the University's decision to prohibit spectators from bringing pointed objects into school athletic events is within its authority; the interest offered up by the University--that is, the limitation of tort liability due to spectator injury in light of the University's increased exposure as a result of changes in statutory law respecting sovereign immunity-is certainly a substantial governmental interest which the stick ban can be said to further. The articulated governmental interest is absolutely unrelated to the suppression of free expression.[3] Finally, the de minimis,

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[3] In its Order dated November 1, 1999, the Court asked that the parties address *O'Brien*'s admonition against the consideration of legislator's motives for the adoption of particular laws: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."

restriction on plaintiff's alleged First Amendment right to wave a flag mounted on a flagstaff is not greater than necessary to serve the University's interest in promoting spectator safety and game management. In short, notwithstanding the plaintiffs impassioned argument that the stick ban's sole object was the abolition of Confederate Battle flags from Vaught-Hemingway stadium, the University's regulation is an acceptable regulation of conduct which does not impermissibly infringe on protected First Amendment expression. See also *Barrett v. Khayat*, Civil Action No. 3:97CV211-B-A (N.D. Miss. Nov. 12, 1999), *aff'd.*, No. 99-60886 (5th Cir. Aug. 18, 2000)(per curiam).

In addition to the foregoing, the Court also adopts the additional reasoning of Judge Biggers in his November 12, 1999 opinion in *Barrett v. Khayat* regarding the reasonableness of the University's policy as one regulating time, place and manner, as well as his analysis respecting the requirement that observers comprehend the intended message. *Barrett* at 7-8. Inasmuch as plaintiff himself recites a litany of intended "messages" he hoped to convey by waving his stick graced with a Confederate flag, the Court is compelled to conclude that his intended audience would not have been capable of discerning his meaning.

CONCLUSION

For the above and foregoing reasons, the Court finds that the defendants' Motions for Summary Judgment are

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"We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it. *Id.* at 3838-84. The Court questioned, specifically, whether the law on First Amendment issues might have so evolved as to render *O'Brien*'s proscription against consideration of policymaker's motives invalid. The Supreme Court's recent decision in *City of Erie v. Pap's A.M.*, reveals just the opposite. ___ U.S. ___, 146 L.Ed. 265, 120 S.Ct. 1382 (2000).

well-taken and should be granted. An order will issue accordingly.

THIS, the 28th day of August, 2000.

/s/ W. Allen
Pepper, Jr.
W. Allen Pepper, Jr.
United States District Judge

Ronald J. Rychlak*, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 1412-1414, 1416--1422, 1426, 1427, 1433 (1992).

* * *

Despite this history, our students, alumni, and supporters, like those at every school, take great pride in the University. (footnote omitted) They are also proud of their southern heritage. When the Civil War broke out, every student and faculty member at the University of Mississippi withdrew or resigned to go fight for the South. (footnote omitted) The campus itself served as a hospital during the war. (footnote omitted) There is even a burial ground located on campus for 600 Confederate and Union soldiers who died here. With this history, it is not surprising that the University clings to symbols of the Old South. The campus is adorned with a statue of a Confederate soldier. (footnote omitted) The University's sports teams are known as the Rebels. The mascot, Colonel Rebel, is a caricature of an Old South plantation owner. (footnote omitted) At football games, the band celebrates the scoring of touchdowns by playing *Dixie*. (footnote omitted) Even the University's popular nickname, Ole Miss, is derived from an old slave term for the white female head of the plantation. (footnote omitted)

To many observers, this celebration of southern pride represents a continuation of the racial intolerance long associated with the South. (footnote omitted) This opinion is expressed with some regularity on campus. It is often met with the rejoinder that this is simply a matter of tradition, or school pride, (footnote omitted) or with the ad hominem argument that outsiders simply do not understand the South. (footnote omitted) Any suggestion that there is more

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* Professor of Law, Associate Dean for Academic Affairs, The University of Mississippi School of Law; B.A., Wabash College; J.D., Vanderbilt University.

racial discrimination in the South than elsewhere is rejected as a false assumption based on ancient history. (footnote omitted) Even that ancient history will sometimes be defended as having been distorted over time. (footnote omitted)

* * *

The issue on this campus that most directly reflects the conflict between the heritage of the Old South and the racial insensitivity of its symbols is the Confederate battle flag, also known as the Rebel flag or the Stars and Bars. (footnote omitted) It first appeared on this campus in the 1940s, and by the 1950s it was "omnipresent." (footnote omitted) Until 1983, the University distributed small Confederate flags before each football game as fans entered the stadium, and cheerleaders carried large flags down on the field. (footnote omitted) The 1981 University of Mississippi yearbook described the scene at a football game with the following words: "[a]midst a sea of Rebel flags waving to the strains of *Dixie*, these Confederate Soldiers fight for the Gallant Cause." (footnote omitted)

In 1983, John Hawkins, the first black cheerleader in the University's history, refused to carry the Confederate flag on the football field, arguing that it represented a symbol of oppression. (footnote omitted) This created quite a stir on campus and throughout the state. In response, and after several heated exchanges between white and black students and alumni, the University renounced any official affiliation it may have had with the Confederate flag. (footnote omitted)

Officially disassociating the flag from the University, however, did not curtail its use. (footnote omitted) The Confederate flag is still displayed proudly about campus and waved vigorously by fans at sporting events. In town, several restaurants and places of business have one or more Confederate flags hanging on the wall. Those who wave it see the flag as a sign of pride in the University and in their southern heritage. Those who oppose it see the flag as a sign

of racial insensitivity that offends minority students, discourages some people from attending the University, and reflects poorly on everyone associated with the University. (footnote omitted)

A couple of years ago, there was an attempt to curtail use of the Confederate flag. The University had been without an official flag since 1983. If the school were to adopt a new official flag, it was thought it might replace the one so many found offensive. Accordingly, the University unveiled a new flag, the "Battle-M." It is similar in color to the Confederate flag, but it has a blue letter M, with white stars, on a red field. The University's Chancellor supported this movement and was photographed waving it at a football game. Today, at many sporting events, the Battle-M is prominently displayed, but it has by no means replaced the Confederate flag. In fact, the new flag seems to have stirred the emotions of at least some Confederate flag wavers and made them even more determined to display their flag prominently. (footnote omitted)

The campus newspaper regularly runs letters from angry students or professors who oppose use of the Confederate flag by people associated with the University. This always prompts several letters in support of the flag. (footnote omitted) Before every football game, someone or some group pays for an advertisement in the school newspaper urging people to "Wave a Rebel Flag." Not surprisingly, those who oppose the flag would like to restrict the areas in which it can be displayed. In particular, many people would prefer not to see it waved at sporting events, where television cameras beam their signals across the nation. Others would like to see the Confederate flag completely banned from campus.

Opposing the flag, of course, is the politically correct position. It is easy to justify attempts to curtail its use: Confederate flags offend people, particularly minorities. (footnote omitted) They run counter to the nurturing aspects of a place of higher learning. They create a hostile

environment. They send the wrong message. Moreover, for everyone associated with the University and the state, they perpetuate the negative stereotypical image of Mississippi "rednecks." (footnote omitted) The Ku Klux Klan has adopted the Confederate flag as its own, displaying it at marches and events. (footnote omitted) How could it also be associated with a state university? These arguments are so persuasive that one normally sane constitutional law professor recently suggested that the flag be outlawed and that anyone showing up on campus displaying one be thrown in jail (no, this was not a classroom hypothetical). (footnote omitted)

Not long ago, several members of the law faculty sat around discussing the Confederate flag, how it offended minority students, how it impacted adversely on the school's reputation, and how we might try to limit or even eliminate its use. A boycott of stores that sold the flag did not seem to be a realistic solution. At least one store (probably several) would continue selling them. Moreover, those who wave Confederate flags are a very significant minority, if not a majority, of those who attend sporting events here at the University of Mississippi. They would continue to buy flags and support the places that sold them. Thus, a boycott would probably not accomplish our objective. Other solutions all seemed to have serious First Amendment complications.

Debates over display of the Confederate flag here at the University of Mississippi do not usually focus on the First Amendment. Most of the arguments center on politics and tradition. Any regulation of the right to display the flag, however, would have to survive a constitutional challenge in court. The issue is controversial enough and the emotions run deeply enough that a suit would certainly be brought if a restriction on displaying the flag were put in place. A flat prohibition of the Confederate flag (even without the potential for incarceration) would have serious constitutional problems. Thus, our task was to find a way to

keep people from waving the Confederate flag without offending the First Amendment of the Constitution.

I proposed an answer that seemed to work. We would simply ban *all* flags from sporting events. They obstructed the spectators' views and posed a potential hazard. (footnote omitted) The stadium already banned umbrellas; flags were similar. This ban might survive a First Amendment challenge because we were regulating conduct, not speech; all flags were being treated equally, and there was certainly a rational basis for this restriction. It was both content-neutral and viewpoint-neutral. The constitutional law professor mentioned above agreed that this just might pass constitutional muster. (footnote omitted)

* * *

As we were preparing for our presentation to the faculty senate, a colleague to whom we had circulated our proposal came to us and said, "you're restricting free speech." I carefully explained that we were really restricting conduct, not speech, and since we were not singling out a specific flag, we needed only to show a rational basis to avoid violating the First Amendment. This regulation, I argued, was clearly constitutional. "Perhaps," he responded, "but you're still restricting free speech."

That accusation recast the entire issue. He did not accuse us of violating the First Amendment; he said *free speech*. To the extent that we had considered the free speech issue, we had seen only the limitations imposed by the First Amendment. Those limitations were simply obstacles that a creative lawyer could avoid. Our plan had been designed in contemplation of those obstacles, and there was at least a reasonable chance that we could get around them. The charge being leveled at us now, however, changed things. No longer was it a simple matter of getting around the First Amendment. Now we had to address the issue at the heart of the matter, free speech.

We had been doing that which was politically correct. The Confederate flag has been called one "of the

most repulsive symbols of [the] past." (footnote omitted) If we got rid of the flag, it would improve race relations, improve the University's image (possibly the state's as well), encourage more minority students to consider attending the University, (footnote omitted) and generally make it a better place for those students who were already here. We had not, however, considered the message that we were attempting to stifle—the feelings and emotions that many people were trying to express by waving the Confederate flag. (footnote omitted) We had only thought about making this campus a nicer place where everyone would get along together. (footnote omitted) As long as our intentions were good, we thought, our actions were justified. (footnote omitted)

The trouble with being politically correct, at least in this instance, was that it conflicted with the right of free expression. * * * We were so concerned about improving race relations and complying with the First Amendment that we did not consider the true impact of our actions. Even if we could avoid the limitations imposed by the Constitution, we were trying to restrict free expression. The Confederate flag symbolizes many different messages. People who wave it might be expressing racial bigotry, but even offensive speech is entitled to protection.[4] For many of the students and

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[4] *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) (finding that government may not prohibit speech just because it is offensive); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (same); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); Gerald Gunther, *Good Speech, Bad Speech: Should Universities Restrict Expression that is Racist or Otherwise Denigrating?*, 42 STAN. L. REV. 4, 7 (1990) (referring to the "elementary First Amendment principle that our Constitution usually protects even offensive, harmful expression"); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 435 (Although he concludes that it is proper to control racist speech on campus, Professor Lawrence also agrees that "[t]here are very strong reasons for protecting even racist speech.").

alumni who wave the Confederate flag, the message is not intended to be offensive at all. (footnote omitted)

* * *

* * * The University of Michigan applied its racial-speech code (since declared unconstitutional) (footnote omitted) in various contexts, including: a graduate student expressing his opinion in a classroom discussion about the morality of homosexuality (he was found guilty of sexual harassment, but not sanctioned); the use of an offensive limerick in class (charges were dropped after the student who read the material apologized, wrote a letter of apology to the student newspaper, and attended a "gay rap" session); and an assertion at an orientation session that the speaker had heard (from his black roommate) "that minorities had a difficult time in [a particular class] and . . . that they were not treated fairly." (footnote omitted) Perhaps the most sweeping regulations were contained in the University of Connecticut's policy, which authorized expulsion for using " 'derogatory names, inappropriately directed laughter, inconsiderate jokes, and conspicuous exclusion [of another student] from conversation.' " (footnote omitted)

* * *

* * * I still would prefer that the flag not be waved. It will be seen on television sports and newsclips, and Mississippi's link with its past racial strife will be strengthened. Some people will decline to enroll in the University because of this imagery, while others who do enroll will live with symbols that they find offensive. The flag might even provoke occasional acts of violence.[5] Still, this is preferable to restricting free expression.

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[5] See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) ("Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the view of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .") (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JIMMY D. GILES, Plaintiff,

VERSUS Civil Action No. 3:99-CV-125-P-A

THE UNIVERSITY OF MISSISSIPPI, by and through its Chancellor, ROBERT C. KHAYAT; BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, by and through its President, RICKI R. GARRETT, Defendants.

AFFIDAVIT OF K.H. "BO" KING

STATE OF MISSISSIPPI
COUNTY OF MADISON

Personally appeared before me, the undersigned authority in and for the state and county aforesaid, K.H. "Bo" King, who, being first by me duly sworn, states on his oath the following:

1. I, K.H. "Bo" King, am an adult competent to testify to all matters herein of my own personal knowledge.

2. While attending football games at the University of Mississippi's Vaught-Hemingway Stadium, I witnessed uniformed University cheerleaders throwing

bundles of small Confederate flags mounted on flagstaffs into the stands for use by spectators.

3. It is my understanding that University of Mississippi officials later desired to discourage and/or prevent the waving of Confederate flags in the stadium.

4. In my opinion the "stick ban" adopted by the University of Mississippi is unnecessary as a safety measure and was adopted as a pretext to prevent spectators from waving Confederate flags in the stadium.

FURTHER AFFIANT SAYETH NOT.

/s/ K.H. "BO" KING
K.H. "BO" KING

SWORN TO AND SUBSCRIBED before me on this the 30th day of December 1999.

/s/ Cynthia Parhm
NOTARY PUBLIC

MY COMMISSION EXPIRES OCT. 12, 2002

SEAL
CYNTHIA PARHM, SCOTT COUNTY, MS
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JIMMY D. GILES PLAINTIFF

VERSUS CIVIL ACTION NO. 3:99CV125-P-A

THE UNIVERSITY OF MISSISSIPPI, by
and through its Chancellor, ROBERT C. KHAYAT;
BOARD OF TRUSTEES OF STATE INSTITUTIONS
OF HIGHER LEARNING, by and through its President,
RICKI R. GARRETT DEFENDANTS

ORDER
(Filed Nov. 1, 1999)

This cause is before this Court on plaintiff's Motion for a Temporary Restraining Order and for a Preliminary Injunction. The Court, having reviewed the motion, finds as follows, to-wit:

That plaintiff's motion for a temporary restraining order is not well-taken and should be, and hereby is, DENIED.

The Court has determined, however, that a hearing is necessary to its determination concerning the motion for a preliminary injunction. Therefore, the Court hereby orders that the parties confer and agree upon a date for hearing to take place on or before Friday, November 12, 1999; should the parties be unable to agree, the Court will unilaterally set the hearing and will notify the parties of the date, time and place of same.

The Court will hear argument directed at the factors for a preliminary injunction outlined in *Canal Authority v. Callaway*, 489 F.2d 567 (5th Cir. 1974), and to the extent

necessary to a determination of whether "plaintiff has a substantial likelihood of prevailing on the merits," the parties are to likewise present testimony and argument directed at the merits of plaintiff's claim that the "stick ban" operates as an impermissible infringement of his First Amendment right to freedom of expression.[6] [7] In particular, the Court is interested in the presentation of argument and evidence concerning the purpose of the stick ban, whether its adoption was a pretext for banning the display of the Confederate flag, and whether the possible existence of an improper, motive or purpose of suppressing such expression is an appropriate inquiry in determining the validity of the prohibition in question. Specifically, the parties are to consider and address whether the Supreme Court's directive in *United States v. O'Brien* that "this Court will not strike down an otherwise constitutional . . . [regulation] on the basis of an alleged illicit . . . motive" is of continuing force and effect or whether the development of subsequent case law permits such a consideration. 391 U.S. 367, 383-84 (1968). That is, whether, notwithstanding the apparent content-neutral nature of a regulation, a Court might strike down the regulation based on evidence which establishes that the regulation was in fact, promulgated with an eye toward the suppression of free expression. See *Church of Scientology Flag Service Org.. Inc. v. City of Clearwater*, 2 F.3d 1514,

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[6] While the plaintiff bears the burden of establishing a clear right to relief based on the factors outlined in *Canal Authority*, the Court is also aware that under the First Amendment analysis concerning government regulation of conduct containing both speech and nonspeech elements, the burden of establishing the requisite governmental interest, the lack of a relation to the suppression of speech, and a merely incidental burden on expressive conduct lies with the government entity supporting the regulation.

[7] In addition to argument and testimony directed toward expressive conduct pursuant to O'Brien as set out *supra*, the Court will also entertain testimony and argument under the forum analysis-i.e., public, limited public, and nonpublic forum and the enforcement of reasonable time, place and manner restrictions under each expressive forum.

1528-29 (11th Cir. 1993). The Court further invites the parties to submit supplemental briefs which address the issue outlined above; such briefs are to be no longer than fifteen (15) pages in length and should be presented to the Court no less than three (3) days prior to hearing.

IT IS, THEREFORE, ORDERED AND ADJUDGED that plaintiff's Motion for Temporary Restraining Order should be, and hereby is DENIED. IT IS FURTHER ORDERED that the Court will hold a hearing on plaintiff's Motion for a Preliminary Injunction at a date and time to be later determined; that any supplemental briefs be limited to fifteen (15) pages and are to be submitted to the Court no less than (3) days prior to the hearing.

SO ORDERED AND ADJUDGED, this-the 1st day of November, 1999.

/s/ W. Allen Pepper, Jr.
W. Allen Pepper, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JIMMY D. GILES — PLAINTIFF

VS. — CIVIL ACTION NO. 3:01-cv-118BN

SERGEANT AT ARMS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES by and through MELVIN GIBBS, STATE OF MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION LAW ENFORCEMENT f/k/a CAPITOL POLICE by and through ROGER JACOBS, KEN STUART, CHARLES FLEMING, CHARLES TAYLOR, AND MAURICE GREER, MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY by and through CHUCK DAYTON, STATE OF MISSISSIPPI by and through MIKE MOORE, JACKSON POLICE DEPARTMENT by and through REGINALD COOPER, and CITY OF JACKSON, MISSISSIPPI by and through KENNETH STOKES — DEFENDANTS

ORDER
(Filed Apr. 4, 2001)

This cause is before the Court on the Motion of the Plaintiff for the Court to Take Judicial Notice of the Controversy Over the Mississippi State Flag pursuant to Rule 201 of the Federal Rules of Evidence. Rule 201 of the Federal Rules of Evidence allows a Court to take judicial notice of a fact if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The rule of judicial notice "contemplates that there is to be no evidence . . . in disproof" of the fact taken. See *Hardy v. Johns-Manville Sales Corp.*,

681 F. 2d 334, 348 (5th Cir. 1982) (citing FED. R. EVID. cmt. g (1965)).

There has been considerable debate in recent months regarding the proposed adoption of a new Mississippi state flag by voter referendum to replace the current, but unofficial, state flag which bears the Confederate battle emblem. The State of Mississippi and City of Jackson, Mississippi concede that a flag controversy currently exists. The Court, therefore, finds that the controversy currently surrounding the issue of the Mississippi state flag is a fact generally known within the jurisdiction of this Court. Accordingly, the Court finds that the Motion of the Plaintiff to Take Judicial Notice of the Controversy Over the Mississippi State Flag is well taken and should be granted.

IT IS THEREFORE ORDERED that the Motion of the Plaintiff to Take Judicial Notice [17-1] is hereby granted.

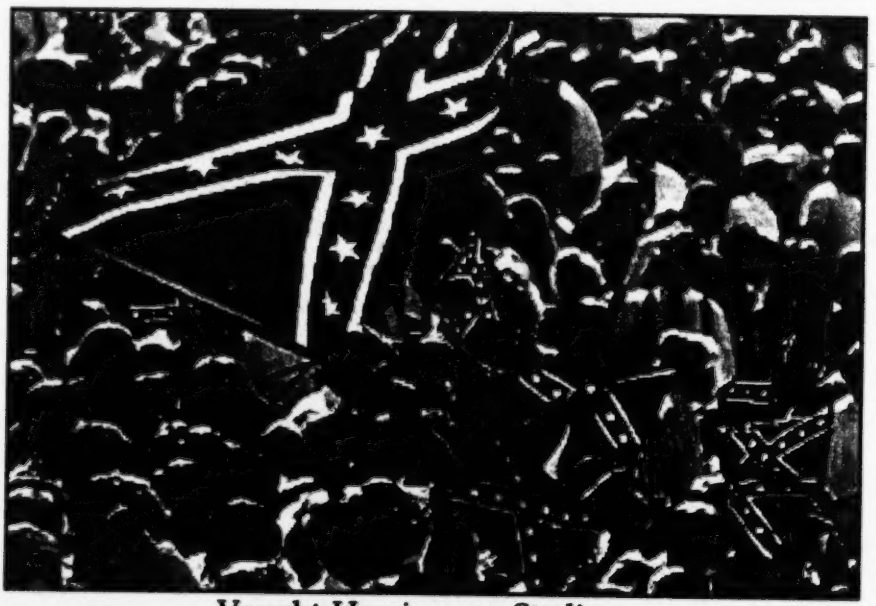
The Court takes judicial notice of the fact that there currently exists a controversy with regard to the flag of State of Mississippi.

SO ORDERED this the 4th day of April, 2001.

/s/ William Barbour
United States District Judge

Context in which flagstaff ban was adopted; background of the Confederate flag controversy at the University of Mississippi showing the flagstaff ban to be a *pretext*. The real motivation of the stick ban was never safety it was always banning display of the Confederate flag.

Curtis Wilkie, *A region apart*, THE BOSTON GLOBE MAGAZINE, Sept. 14, 1997, at http://www.boston.com/globe/magazine/9-14/south/.



Vaught-Hemingway Stadium,
Oxford, Mississippi pre-"stick ban"
(AP Photo / Tannen Maury)

* * *

After the first black student was enrolled 35 years ago over the bloody resistance of segregationists, the historian Walter Lord called his account of the crisis *The Past That Would Not Die*. African-Americans now account for more than 10 percent of the student body and have starring roles as Ole Miss athletes; nevertheless, celebrations of the bygone era become most palpable on autumn

Saturdays, when the Rebels storm on to the football field, the band plays "Dixie," and a mascot dressed as the mythical Bourbon planter, "Colonel Rebel," swaggers on the sidelines. Despite attempts by the school administration to discourage the use of another controversial symbol, Ole Miss followers still wave the battle flag of the Confederacy.

* * *

Last winter, Robert C. Khayat, the Ole Miss chancellor, moved to correct the image problem by commissioning a study of "how we are perceived." Another university official, acknowledging that the symbols were under review, said, "Everything is on the table but the name Ole Miss."

* * *

Results of Khayat's survey of high school seniors, parents, and college placement personnel in the region said that Ole Miss was underappreciated outside the school's family. There were no recommendations to retire the symbols. At a news conference in July, when the results were released, Khayat said there might be some "modifications" of Colonel Rebel, but that the other symbols would "evolve over time."

* * *

* * * But despite the strides the region has made since the back of official segregation was broken in the 1960s, the South remains a very separate and distinct part of America. It is a staunchly conservative region where states' rights are worshiped as widely as Jesus Christ, where the forces of history and religion, combined with early patterns of immigration, have created a unique and unbending culture. Even as the region moves, newly prosperous, into the 21st century, it still resists change with the same passions that triggered the shots on Fort Sumter in 1861.

* * *

As events demonstrated this spring in Oxford, Mississippi, and Columbia, South Carolina, where the Legislature resisted efforts to bring down the Confederate

battle flag from atop the state Capitol, Southerners are still marching, unapologetically, to their own drummers, glorifying their traditions and defying change.

The Associated Press, *Khayat considering image change for UM*, NORTHEAST MISSISSIPPI DAILY JOURNAL, Feb. 28, 1997, at A1.

OXFORD — University of Mississippi Chancellor Robert Khayat is considering changing the school's image by dropping some racially negative symbols.

Almost 14 years ago the Confederate flag was officially disassociated with Ole Miss. Now, Colonel Reb, the nickname Rebels and the fight song "Dixie" may face the same fate.

The symbols are all up for review by two independent marketing firms commissioned by Khayat to improve the image of the university.

"For way too long the public perception, and sometime our internal perception has been inaccurate and too heavily influenced by negative events in our past," Khayat said. "We need to get rid of negative perceptions. They impede our mission and our destiny."

Representatives from the firms are examining the image of Ole Miss through meetings with students, faculty, administrators, staff and alumni. From those meetings they will make recommendations for any changes to the school's existing official symbols or names.

The firms will turn in their proposals and budgets to Khayat within two weeks.

Kendall Bowlin, a junior from Florence, supports the symbols, saying they do not represent racism. "You take all that away (university symbols) and it's not Ole Miss anymore," he said.

But Jada Love, a black student from Memphis, Tenn., finds the symbols offensive.

"Any way you look at it, it represents slavery," she said. "We've been tagged with racism for so long, its time for us to get a new image."

The review of the university' image comes during the height of the school's Sesquicentennial Celebration, and Khayat said there is a connection.

He said the names of streets on campus (such as Confederate Drive) might also be changed to better describe what is on those streets.

"We're looking at ways to make this campus as friendly and inviting as it can be," Khayat said.

Andy Kanengiser, *Khayat — Rebel with a cause, University president tries to enhance school's image for a new century,* THE CLARION-LEDGER, Mar. 9, 1997, at A1.

OXFORD — Many are diehard Rebels with a cause.

They're locked in an emotional tug-of-war with a smaller number of people seeking a new image for the University of Mississippi.

Student and alumni emotions are running high on both sides as Ole Miss leaders debate whether to retire Colonel Reb, stop singing *Dixie* and boot the nickname Rebels.

Some black students at Ole Miss say the symbols are painful reminders of racial oppression and should go. Chancellor Robert Khayat says the symbols are among many things under evaluation as he tries to improve the university's image and academic reputation.

News reporters from *the New York Times,* CNN and *The Boston Globe* among others, are flocking to the north Mississippi college town as the battle unfolds.

"Heritage is heritage," said retired Ole Miss business professor Rufus Jones, 70, a 1949 university alumnus. "I hate to see them get rid of the Rebels. It is a long tradition," the Oxford native said outside the town's post office. "I hope reason prevails."

* * *

Many are singing Ole Miss' praises. Col. Reb, the school's mascot defended his reason for being. In a column in *The Daily Mississippian* student newspaper last week, senior Chris Baxley, who serves as Ole Miss' Col. Reb in 1996-97, weighed in with his analysis, "As Col. Reb, I have had the fortune of being the object on which people of all ages, races, genders etc. pour their love and appreciation to their university," he wrote.

But senior Shamorrow Thomas, 20 of Clinton expressed the views of others: "It's nice to see the subject is being brought up. A lot of people feel we've been in the same situation for so long."

The decision-maker here is Khayat, who's hired a New York based marketing firm to explore changes for Ole Miss' image. The study is designed to offer guidance as university officials seek to hone the university's academic mission as the 21st century nears, he said.

"I support Khayat. It will cause controversy, but any change will," said junior Brian Hopkins, 23, of Clinton. "Ole Miss is a publicly funded school. There comes a time to change."

Ole Miss students should focus on more important issues, such as drugs, poverty, and homelessness, said Oxford resident James Jackson, 54, a mental health center worker. "These are the issues to concern ourselves with," he said.

Stephen Hawkins, *Dispute rages over Ole Miss symbols,* NORTHEAST MISSISSIPPI DAILY JOURNAL, Mar. 9, 1997, at A1.

OXFORD – A study by the University of Mississippi to assess its academic reputation has quickly turned into a debate about symbols that some critics say are reminders of the school's racially troubled past.

Mascot Col. Rebel, outfitted like an old Southern gentleman, and the fight song "Dixie" embody the

university's heritage for some. But they provide painful reminders for others.

So the discussion quickly turned to those and other symbols when Ole Miss officials made public plans for the nationwide marketing survey to assess and improve the image of the school that James Merideth first integrated 35 years ago.

"The total image of Ole Miss is obviously so controversial, that we think that is what they are talkir.g about," said Chris Bridgewater, a white senior from Memphis, Tenn. He has organized one of at least two students groups that want to preserve the symbols.

University officials insist the idea is simply to enhance the institution's academic reputation.

A primary goal of Chancellor Robert Khayat is landing a chapter of Phi Beta Kappa, the prestigious academic honor society, for the 148-year-old university. That quest suggests a top-to-bottom review of goals, objectives, programs and image.

But Bridgewater and others say they fear the review could mean the death of some of the most hallowed traditions at Ole Miss.

"They are not ruling out changing our symbols," said Bridgewater, whose Rebel Student Union T-shirts are emblazoned on the back with "Save Colonel Reb."

The university officially disassociated itself with the Confederate battle flag 14 years ago, but a sea of them still wave at football games played on the Oxford campus.

Such symbols are often considered racially offensive because of their relationship to slavery and the Civil War.

"When people are in large groups, waving Rebel flags, cheering Dixie, other things tend to happen. They say things that are offensive to black folks," said state Sen. Johnnie Walls, D-Greenville, who attended the Ole Miss law school and is head of the state National Association for the Advancement of Colored People.

"The symbol that evokes the most bad feeling is the flag. You see it in any footage of Klan marches. The Col. Reb and Dixie are not in that same category or nearly as offensive, though Dixie is close."

* * *

Some students are turned off by the symbols, said Benjamin Wells, president of Phi Beta Sigma, the only black fraternity with a house on the university's Fraternity Row.

"I have people who talk to me about coming to school here who are turned away by the flag," said Wells, a junior from Hamilton. "I understand that people say it has no meaning, that it is heritage not hate. But the thing behind that heritage is slavery."

Robert C. Khayat*, *Ole Miss must be certain it is seen as center for academic excellence, In an effort to strengthen our academic reputation, our evaluation will focus on substance, not symbols*, THE CLARION-LEDGER, Mar. 23, 1997, at G1.

* * *

In addition to knowledge gained and skills developed in classes, students learn much about their lives during their college years. Our responsibility demands that we provide a safe, nurturing environment that encourages healthy growth and development – intellectual, emotional, physical, spiritual and social. We are committed to helping students prepare for meaningful careers and noble lives.

To a great extent, the value of a degree is related to the reputation of the university. We are committed to our students and to assuring that a degree from the University of Mississippi is universally respected.

* * *

Building on a rich history of strong academic programs, preserving and enhancing our beautiful campus, assuring that we are an open, inclusive, nurturing

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* Robert C. Khayat is chancellor of the University of Mississippi.

community, Ole Miss – with the support of our alumni and the people of Mississippi – will be a model university in a rapidly changing world.

Mickie Anderson, *Supporters control fate of Ole Miss's symbols*, THE COMMERCIAL APPEAL, Jul. 19, 1997, at A1.

Traditional symbols so familiar to University of Mississippi fans – the Colonel Reb mascot, the band playing *Dixie*, and the Rebel nickname – won't change unless students and those with school ties push for new ones, the school's chancellor said Friday.

Ole Miss officials Friday morning announced the results of a survey taken during May and June that attempted to gauge whether the school has an image problem.

The main focus of the study was the school's academic reputation, but speculation that the study might call for scrapping the symbols got most of the attention. The study recommended that the school do more to promote itself.

Some believe the school's Old South symbols have racist overtones and have limited the school's potential by hampering recruitment of black athletes and scholars. But challenges to the school's traditions have historically been met with strong resistance.

Even before the study was complete, many of the people associated with it received hate mail, chancellor Robert Khayat said.

The symbol question is, without a doubt, an emotional issue for Ole Miss fans.

So emotional that Khayat's voice broke and his eyes reddened with tears as he tried to explain his position on the issue to news reporters and student journalists, who resisted his attempt to focus the survey's results on the school's academic reputation.

"The Confederate flag is not the symbol for the University of Mississippi," he said. "And I would ask Ole Miss people to think very carefully before using it as a symbol."

School officials scrapped the use of the Confederate flag as an official school symbol more than a decade ago, and replaced it with a red-and-blue "M" flag. The move didn't stop some fans, however, who still wave Confederate flags before and during football games.

He said Colonel Reb, the school's mascot, may get a fashion update for a more "vital" look in the near future, but that the school's athletic director would make that decision.

Short of that, any decision about the school's symbols will have to come from students and alumni, he said.

"I can't dictate how people behave. That's just not how we do business," Khayat said. "Students are the key players to challenge and take positions and stand up and be counted. I think it's on the table and it's in their hands."

Bill Spencer, *Tuberville wants flag gone, Ole Miss coach says survey results don't change his mind about Confederate flag,* THE CLARION-LEDGER, Jul. 19, 1997, at A1.

Ole Miss football coach Tommy Tuberville still wants fans to stop waving the Confederate flag despite a study released Friday revealing little disfavor with the Rebels' symbols and traditions.

Displaying of the flag has harmed Ole Miss recruiting efforts, Tuberville said. The school doesn't use the flag as an official symbol, but some fans display the flag at games.

"Other recruiters use it against us," Tuberville said. "It's not one of our symbols."

Ole Miss Chancellor Robert Khayat said an outright ban of the flag is unconstitutional, but he hopes to discourage students from displaying it at the Rebels' games.

Nearly 1,500 people were surveyed by a New York–based public relations company hired by Ole Miss to explore the university's image, academic strengths, symbols and traditions.

Only 4 percent of those surveyed referred to symbols such as Colonel Reb, the Confederate flag and the *Dixie* fight song as reasons for looking unfavorably on the university.

"I think the flag is 95 percent of that particular perception," said Jackson accountant Jon Turner, 41, president of the Central Mississippi chapter of the Ole Miss Alumni Association.

"I don't think there's any real significant problem with any of the so-called symbols other than the flag. People waving those flags certainly don't intend for it to have that impact, but it does.

"From all other aspects, the study seems to indicate that Ole Miss is a special nickname for one and all other things connected to the university in Southern heritage are not necessarily negatives."

Levorn Jones, 28, said some symbols – especially the flag – always will carry a stigma.

"I don't have a problem with it. I would go to Ole Miss today," said Jones, a Jackson radio producer who attended Southern Mississippi. "A lot of times, the student-athletes would like to go to Ole Miss, but the problem is with the parents.

"There may be a stigma tied to the aspect of the flag, maybe what it stood for in the beginning. That's an image that's hard to look over.

"Generally, it's what it means to different people. You have the guy with a Rebel flag on his truck: it's a stigma. Not everybody who shows the flag has that feeling, but I think the whole thing is stigmatized."

Sam Lane, 42, past Central Mississippi alumni president, trusts Khayat to take Ole Miss in the right direction regarding image.

"My feeling on it is that Khayat has the best interests of Ole Miss at heart," said Lane a Jackson banker.

Tony Plohetski, *Ole Miss may bar rebel flag, Student senate will decide Tuesday if flags will be allowed in stadium*, THE CLARION-LEDGER, Oct. 17, 1997, at B1.

OXFORD – University of Mississippi football fans who enjoy waving small Confederate flags at games may soon be barred from bringing them to Vaught-Hemingway Stadium.

Four members of the Associated Student Body Senate have drafted a resolution to permanently ban the "stick" flags after Ole Miss football coach Tommy Tuberville asked that Confederate flags not be brought to the stadium, saying that they impede player recruitment.

In a separate resolution also to be voted on Tuesday night by the 52-member senate, the Associated Student Body will ask students not to bring Confederate flags to any athletic event.

"The focus of our issue is the Confederate flag and the image Ole Miss has been associated with because of it," said ASB senator Matt Lott, a Greenville native. "Our overall goal is to discourage people from bringing them."

Said ASB senator Stephen Harrell: "We're just trying to get them out of the stadium. It's hurting our recruitment, and a lot of students feel that the University of Mississippi is racist, and they go to other schools (because of it)."

Harrell said a proposed resolution printed in Thursday's campus newspaper, *The Daily Mississippian*, was later changed to divide the stick flag/Confederate flag issue into separate resolutions.

"We originally used sticks as an excuse (for a resolution)," he said. "What we want to say is that we as a student body don't want people bringing Rebel flags into the stadium.

"It's time for the University of Mississippi to change for the better, and this is a good way to do it."

Many students, like Ole Miss junior Katie Furlong, believe the student senators are using the safety issue as an excuse.

"I think that banning sticks and hiding behind the issue of safety is ridiculous. If they want to ban sticks to prevent students from carrying rebel flags, I guess they might as well go on and do it," she said.

Bill Bunting, *Boone to meet with coaches to decide next step*, THE DAILY MISSISSIPPIAN, Oct. 22, 1997, at 1.

The Associated Student Body has taken a stance on the issue of fans bringing Confederate flags to Vaught-Hemingway Stadium, but where the ASB will stand on banning sticks has yet to be seen.

Today, athletic director Pete Boone will meet with the coaching staff to discuss the best way to help comply with what amounts to the request of the student body that the Confederate flag not be brought into the stadium.

The only way to assure this request is carried out would be through the banning of sticks in Vaught-Hemingway during football games.

Reports from various ASB officials said that by implementing a ban on sticks, Ole Miss would be following the lead of eight other Southeastern Conference schools. The ASB was given their information by assistant athletic director for sports information Langston Rogers, who said he called the other schools.

The Daily Mississippian contacted the 12 member schools of the SEC and found different results from those reported by the ASB. Rogers said he could not explain the discrepancies between the reports.

The universities of Auburn, Florida, Georgia, Kentucky, LSU, Mississippi State, South Carolina and

Vanderbilt all reported that they have no official policy banning sticks in their respective stadiums.

Ted Stickles, game day manager for Tiger Stadium at LSU, elaborated on the policy at LSU concerning poles.

"At LSU, we have a policy prohibiting poles in the stadium," Stickles said. "A pole that could support a three-foot by five-foot flag would not be allowed, but a stick for a smaller flag would be perfectly acceptable."

The universities of Alabama and Arkansas were the only member institutions that reported bans on sticks in their stadiums.

John Gilbert, an official in the athletic department at Alabama, explained the policy. "We have a strict policy prohibiting sticks in any form in the stadium," Gilbert said. "I would say that it is well enforced because we catch about 85 percent of the sticks people try to bring in the stadium."

USA TODAY, *Black lawyers slam Rehnquist over song*, THE CLARION-LEDGER, Aug. 10, 1999, at A4.

The nation's largest organization of black lawyers is protesting a recent sing-along at a judicial conference at which U.S. Chief Justice William Rehnquist led the singing of *Dixie's Land*.

"The 18,000-member National Bar Association this week is sending Rehnquist a copy of a resolution passed at its recent Philadelphia convention expressing "outrage" at him for including the popular but controversial Southern anthem in his annual sing-along at a judicial conference in Hot Springs, Va., in late June.

A court spokeswoman said Rehnquist would have no comment on the resolution.

Federal judges and lawyers from Maryland, Virginia, West Virginia, North Carolina and South Carolina sang with Rehnquist. Some African-Americans at the conference reportedly stayed away from the event because of the song.

"It's the war song of the South," said Randy Jones, past president of the black lawyers' association.

Jones said Rehnquist's actions were "especially shocking, given the climate at the court" amid controversy over its record of hiring few minority law clerks.

The National Bar Association resolution urges Rehnquist to "refrain from such offensive conduct in the future."

Evidence in Opposition to the University's Motion for Summary Judgment, which was struck by the District Court

Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 (1992) (App. 11-17).

Affidavit of K.H. "Bo" King (App. 18-19).

Khayat considering image change for UM, NORTHEAST MISSISSIPPI DAILY JOURNAL, Feb. 28, 1997, at A1 (App. 27-28).

Andy Kanengiser, *Khayat — Rebel with a cause, University president tries to enhance school's image for a new century*, THE CLARION-LEDGER, Mar. 9, 1997, at A1 (App. 28-29).

Andy Kanengiser, *UM symbols to be topic at forum, Opponents and proponents to debate the issue tonight*, THE CLARION-LEDGER, Mar. 19, 1997, at A1.

Tony Plohetski, *Battle lines clear at Ole Miss symbol forum, More than 100 students participate, argue sides from racism to tradition*, THE CLARION-LEDGER, Mar. 20, 1997, at A1.

Mickie Anderson, *Supporters control fate of Ole Miss's symbols*, COMMERCIAL APPEAL, Jul. 19, 1997, at A1 (App. 32-33).

Jenny Dodson, *Khayat: symbols expected to 'evolve' over time*, THE DAILY MISSISSIPPIAN, Jul. 21, 1997, at A1.

Robert C. Khayat, *Ole Miss must be certain it is seen as center for academic excellence, In an effort to strengthen our academic reputation, our evaluation will focus on substance, not symbols*, THE CLARION-LEDGER, Mar. 23, 1997, at A1 (App. 31-32).

Bill Spencer, *Tuberville wants flag gone, Ole Miss coach says survey results don't change his mind about Confederate flag*, THE CLARION-LEDGER, Jul. 19, 1997, at A1 (App. 33-35).

Robert Falkoff, *Ole Miss coach asks fans to drop rebel flag, Confederate flag hurts school's image, athletic program, Tuberville says*, The CLARION-LEDGER, Sept. 26, 1997, at A1.

Tony Plohetski, *Many defy coach's plea to drop rebel flag, Banner called tradition, not racism, but at least one student offended*, THE CLARION-LEDGER, Sept. 28, 1997, at A1.

Tony Plohetski, *Ole Miss may bar rebel flag, Student senate will decide Tuesday if flags will be allowed in stadium*, THE CLARION-LEDGER, Oct. 17, 1997, at A1 (App. 35-36).

Tony Plohetski, *Ole Miss senate votes to condemn flag waving, Resolution urges students not to bring rebel flags to games*, THE CLARION-LEDGER, Oct. 22, 1997, at A1.

Tony Plohetski, *Ole Miss officials OK ban on stick flags in stadium, Athletic director says he believes most fans will agree with decision*, THE CLARION-LEDGER, Oct. 23, 1997, at A1.

Mike Knobler, *Sticks or not, flags appear on TV at Ole Miss game, Some say they brought Confederate symbols to protest the no-stick policy*, THE CLARION-LEDGER, Nov. 7, 1997, at A1.

Jerry Mitchell, *Symbols of past not easily vanquished, Emotions strong on both sides of longstanding debate over rebel flag*, THE CLARION-LEDGER, Nov. 24, 1997, at A1.

Josh Van, *Chucky Mullins injured against Vanderbilt in 1989 homecoming*, THE DAILY MISSISSIPPIAN, Sept. 17, 1999, at A1.

Confederate Flag Controversy Continues at Ole Miss, FIRST AMENDMENT CENTER, Oct. 23, 1997, at A1.

John Pruett, *Flag flap apparently over*, THE HUNTSVILLE TIMES, 1997, at A1.

'Nothing on a stick' policy will be enforced, Fans who try to bring in sticks will be treated in professional manner, THE OLE MISS SPIRIT, Nov. 8, 1997, at 2.

Curtis Wilkie, *A region apart*, THE BOSTON GLOBE MAGAZINE, Sept. 14, 1997, at http://www.boston.com/globe/magazine/9-14/south/ (App. 25-27).

Gail Russell Chaddock, *Students at Ole Miss Push to Shed Symbols of Past*, THE CHRISTIAN SCIENCE MONITOR, Apr. 10, 1998, at A1.